CALIFORNIA MEDIATION AND CONCILIATION SERVICE

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| In the Matter of Arbitration of<br><br>JURUPA UNIFIED SCHOOL DISTRICT,<br><br>Employer,<br><br>And<br><br>CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,<br><br>Union, | CASE NO.:<br>C.S.M.C.S<br>ARB-06-0145 |

APPEARANCES:

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| ARBITRATOR: | Arturo J. Morales, Esq. |
| FOR THE EMPLOYER: | Christopher D. Keeler, Esq.<br>Susan Park, Esq.<br>Fagen, Friedman & Fulfrost. LLP<br>1 Civic Center Dr., Suite 100<br>San Marcos, CA 92069 |
| FOR THE UNION: | Tim Taggart, Labor Relations Rep.<br>California School Employees Ass'n.<br>10211 Trademark Avenue<br>Rancho Cucamonga, CA 93017 |

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| | ) | |
| Union, | ) | |
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This matter was heard before the Arbitrator on February 6, 2007 at the administrative offices of the Jurupa Unified School District. The parties were present and represented. Both parties called witnesses, presented evidence, and made arguments. At the conclusion of the hearing, the parties filed written closing briefs and this matter is now before the Arbitrator for decision.

## INTRODUCION

On June 26, 2006, the California School Employee Association ("CSEA") filed a level 2 grievance on behalf of employees who were activity supervisors prior to January 1, 1994. The grievance alleged that these employees were added to the bargaining unit without giving them credit for their years of service earned prior to January 1, 1994. This controversy is at the heart of this matter.

I.

## STATEMENT OF THE ISSUE

The parties stipulated that the issue to be decided is as follows:

> "(w)hether Activity Supervisors should receive service credit for service rendered prior to January 1, 1994, for purposes of longevity and vacation accrual or any other benefits."

II.

## RELEVANT CONTRACT EXCERPTS

The contract provisions relied upon by the Union were set forth in the Union's 2nd level grievance and are Articles 13 and 18. The relevant portions of these sections are as follows:

> {Article 13} Section 7-Longevity Increment.
>
> Effective July 1, 2001, a unit member who has completed twenty (20) years of employment in the District shall receive a two thousand three Hundred sixty-five dollar ($2,365) longevity increment each subsequent year in addition to his/her placement on the Classified Salary Schedule. The longevity amount shall increase to three thousand two hundred and sixteen dollars ($3,216) for unit members who have completed twenty-five (25) years. The longevity increment shall increase to four thousand and sixty eight dollars ($4,068) for unit members who have completed thirty (30) years.

[Article 18] Section 1-Allowance for Full-Time Unit Members.

Vacation is accrued by unit members in accordance with the schedule set forth below. The schedule is premised on a twelve (12) month year and eight (8) hours per day.

Unit members in their first 5 years of employment shall earn thirteen (13) days vacation annually…

Unit members in their 6th through 8th year shall earn sixteen (16) days vacation annually…

III.

STATEMENT OF RELEVANT FACTS

(As Found by the Arbitrator)

On September 3, 1993, CSEA filed a unit modification petition. The petition sought the inclusion of Activity Supervisors in the CSEA bargaining unit. On September 23, 1993, the District and CSEA jointly requested that the unit modification petition be put on hold pending negotiations over the issue.

On October 29, 1993, CSEA submitted to the District its proposal for including Activity Supervisors in the CSEA unit. On November 1, 2003, the District made a counter proposal. The District proposed that the parties must negotiate the details of how the current articles would be revised or replaced to include Activity Supervisors and also that the effective date of any agreement must be negotiated.

On November 3, 2003, the parties reached a tentative settlement of their negotiations for the 1992/93 school year. The parties agreed to modify the CSEA bargaining unit to include Activity Supervisors and that this modification would be effective January 1, 1994. During the negotiations, the parties did not address whether

Activity Supervisors would be given credit for years of service before their inclusion in the CSEA bargaining unit.

After the negotiations for the 1992-1993 school year, the District began implementing the new contract provisions, including the inclusion of Activity Supervisors into the CSEA bargaining unit. To this end, a District staff member met with each of the employees being added to the CSEA bargaining unit. She had each of these employees sign a Personnel Assignment Order which set forth an "Effective/Hire Date" of 1-1-94.

The District has a practice of creating Seniority Lists for bargaining unit members on an annual or bi-annual basis. The District gave copies of these lists to CSEA. For Activity Supervisors who became members of the bargaining unit effective 1-1-94, even though their hire date was earlier, the Seniority Lists showed their hire dates as 1-1-94.

The District's usage of 1-1-94 as the effective date of hire for Activity Supervisors had an immediate impact. When the entitlement of Activity Supervisors to vacation pay was being calculated, the 1-1-94 hire date meant that Activity Supervisors with five or more years of seniority, prior to their inclusion in the bargaining unit, would not be given the three additional vacation days to which Activity Supervisors are entitled as employees in their sixth year of employment.

On June 26, 2006, CSEA filed a level 2 grievance on behalf of employees who were Activity Supervisors prior to January 1, 1994. The grievance challenged the District's practice of adding Activity Supervisors to the bargaining unit without giving them credit for their years of service prior to January 1, 1994.

Prior to the June 26th grievance, CSEA had expressed its concern over the District's practice. In this regard, in the Spring of 2004, CSEA's Chief Job Steward

inquired about the calculation of longevity for a particular employee in a meeting between the Chief Job Steward and the District's Assistant Superintendent of Human Resources. The Chief Job Steward's inquiry was precipitated by upset Activity Supervisors. In response, the District explained that it was using the 1/1/94 date as the hire date for Activity Supervisors who had been hired prior to 1/1/94 but were included in the CSEA unit effective 1/1/94. The CSEA received this information and was thereafter silent until the filing of the June 26, 2006 grievance.

IV.

ANALYSIS AND DISCUSSION

The grievance leading to this arbitration was filed by CSEA on June 26, 2006. The grievance concerns actions by the District that go back to the 1994 calendar year. Given that the time limit for filing a grievance is 30 days from the date the "grievant knew or should have known of the occurrence giving rise to the grievance" and the fact that the District's action about which the Union complains was 12 to 13 years earlier, the question of the timeliness o f the grievance must be confronted.

The contract provision which governs the question of timeliness is set forth at Article 8, Section 3, Level 1, as follows:

> (w)ithin thirty (30) days after the grievant knew or should have known of the occurrence of the act or omission giving rise to the grievance, the grievant or his/her authorized representative must present the grievance in writing on the appropriate District grievance form to his/her supervisor.

CSEA argues that its second level grievance that was filed on June 26, 2006 is timely because CSEA never knew of "the occurrence of the act or omission giving rise to

the grievance" until "shortly before this grievance was filed." The evidence, however, weighs heavily to the contrary.

First, by CSEA's admission, Chief Job Steward received an inquiry in the Spring of 2004 from an upset member about the District's practice in not counting prior service by Activity Supervisors. The District then told the Chief Job Steward about its use of the January 1, 1994 date in calculating benefits for Activity Supervisors. The Chief Job Steward, however, did not realize that anything in violation of the contract was occurring.

CSEA's lack of knowledge or realization that the basis for a grievance existed is not the determining consideration. The question is whether CSEA "should have known" of the basis for the grievance. Here, the Chief Job Steward on behalf of a member inquired about how the District calculated longevity. The District responded that it used the date, 1/1/94, that Activity Supervisors became members of the CSEA bargaining unit for calculating longevity and not the actual hire date for these employees. Thus, with all of the basic facts in hand, CSEA "should have known of the occurrence of the act or omission giving rise to the grievance" and as such, the 30-day time limit for filing a grievance was triggered.

Second, CSEA, a decade before, should have known of the occurrence of the act or omission giving rise to the grievance. At the very beginning of the use of the 1/1/94 date, the District held orientation meetings with each affected Activity Supervisor and told them how the 1/1/94 date was being used. Thus, the affected members and CSEA had the basic facts needed for a grievance years before it was filed if rudimentary reflection was given.

Third, the District gave to CSEA once or twice a year "Seniority Lists" it had created. The lists showed that the hire date for activity Supervisors hired before 1/1/04

was not their actual hire date but rather the 1/1/94 date when Activity Supervisors were added to the CSEA unit. Again, the CSEA had the facts it needed to prepare and file a grievance over the District's practice.

Given that the CSEA knew or should have known of the occurrence of the act or omission giving rise to the grievance over ten years ago, the grievance is untimely. In this context, the questions have been reached of whether the "continuing violation" doctrine applies. If it applies, it will make CSEA's tardy grievance timely.

The continuing violation doctrine first arose in the employment discrimination/ Title VII. setting. The doctrine makes discrimination charges timely when an untimely event continues or reoccurs from sometime in the past into the present. For example, in a case of sexual harassment where the harassment was continuous for three years and where the time limit for filing a charge is 180/300days, a plaintiff is allowed to reach back three years for her damages. The theory is that if there is a present violation, the plaintiff can go back in time and recover damages for related violations which continue from the past to the present. Pages 281-282, How Arbitration Works, Elkouri & Elkouri (1997).

The continuing violation doctrine does not exist in all work place contexts. For example, the continuing violation theory does not apply to terminations, failures to hire, demotions, or promotions. There can be no continuing violation in these contexts because at the root of these claims is a discrete action which can be identified, understood, and challenged once discovered. Moreover, these actions occur once even though there might be continuing effects.

It could be argued that a termination involves a continuing violation in that each pay period in which the plaintiff wrongfully misses a paycheck due to his termination

involves repeated and continuing harm. The Supreme Court in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061 (2002) rejected this thinking ruling that the missed paycheck situation involves the mere effects of some prior discrete action and not a true continuing violation. Thus, the time limit for filing runs from the date of the discrete action and not from its effects.

In this matter, the question confronted is whether the factual situation at issue is more like a sexual harassment case with a lengthy continuing violation or a discrete action like a termination or demotion with after effects that are non-continuing. First, considered is the nature of the wrong.

The wrong here was when a District staff person decided in 1994 that the hiring date for Activity Supervisors being newly included in the CSEA unit should be 1/1/94. Subsequently, this hire date has followed these Activity Supervisors in their calculation of vacation days and computation of longevity pay.

Thus, the action at issue here was discrete, defined, and capable of challenge. Once the District put the Activity Supervisors on notice at their orientations back in 1994 that 1/1/94 date would be used as their hire date, those employees were obliged to file grievances within 30 days of their knowledge of the practice. "Arbitration: Time Limits and Continuing Violation," Richard Bloch, Michigan Law Review (1998).

The argument could be made that this is a situation where each year the wrong against Activity Supervisors is repeated when vacation days and longevity pay are calculated for the new year. This argument would not be well taken.

The harm, if there was one, occurred in 1994 when the 1/1/94 hire date was given to the Activity Supervisors. What happen in each subsequent year are the mere effects of

the original decision and not some new repeated harm. Thus, CSEA's grievance is not entitled to application of the continuing violation doctrine and it is thereby untimely.

V.

AWARD

The grievance is untimely and is denied in its entirety.

June 11, 2007

Respectfully Submitted,

/s/

Arturo J. Morales
Arbitrator